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IN THE

Supreme Court of the United States

October Term, 1963

No. 785

GERSON NAGELBERG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 24th day of October 1963, which affirmed an order of the United States District Court for the Southern District of New York denying petitioner's motion to withdraw a plea of guilty made *prior* to sentence and the judgment of conviction entered upon such plea.

The Opinion Below

The per curiam opinion of the Circuit Court of Appeals in this case has not yet been reported, but is set forth in Appendix A, infra, page 11.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 24th day of October 1963, Appendix B, *infra*, page 12. Rehearing was denied on November 27, 1963, Appendix C, *infra*, pages 13 and 14. By order of Honorable John M. Harlan, Associate Justice of this Court, dated December 13, 1963, the time for the filing of this petition for writ of certiorari was extended to and including the 25th day of January 1964.

Jurisdiction of this Court is invoked under 28 USC, Sec. 1254(1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in basing its decision upon an inapplicable citation and in applying the wrong standard of "manifest injustice" to the petitioner's motion for withdrawal of his plea of guilty, which was made *prior* to sentence?

2. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's mistreatment of petitioner's motion for withdrawal of the plea of guilty, as a request for clemency?

3. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's wrongful assumption that the withdrawal of petitioner's plea of guilty *prior* to sentence, was not a matter of discretion?

4. Whether the Circuit Court of Appeals erred in sanctioning the arbitrary action of the District Judge in preventing petitioner from specifying the grounds of his motion to withdraw his plea of guilty?

5. Whether the Circuit Court of Appeals erred in basing its decision upon a contention not asserted by petitioner?

6. Whether the Circuit Court of Appeals erred in failing to construe petitioner's plea of not guilty, as an assertion of innocence.

Statute Involved

Rule 32(d) provides in pertinent part:

> "(d) A motion to withdraw a plea of guilty * * * may be made only *before* sentence is imposed * * *"

Statement of the Case

On April 11, 1962, petitioner was arraigned in the United States District Court for the Southern District of New York and charged with two offenses of possessing and selling narcotics and one count of conspiracy to do so. The jurisdiction of the District Court was invoked under 21 USC Secs. 173, 174. At that time petitioner pleaded "not guilty". Thereafter on July 18, 1962, petitioner changed his plea to "guilty". Subsequently, on November 16, 1962, and *prior* to sentence, petitioner moved for the withdrawal of such guilty plea and for leave to reinstate his plea of not guilty, upon the basis of certain unspecified factors and facts which had arisen since the guilty plea. This application was not opposed by the Government. Nevertheless, the motion was summarily denied and petitioner was not permitted to specify the grounds thereof. On March 18, 1963, the motion was renewed, this time with the consent of the United States Attorney, but was again denied, and *thereafter* sentence was imposed. Petitioner's motion was made *prior* to sentence.

In affirming the judgment of conviction, the Circuit Court of Appeals for the Second Circuit cited and relied upon *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (2nd Cir. 1948), which petitioner contends is inapplicable to the case at bar.

Reasons for Granting the Writ

1. The Circuit Court of Appeals erred in basing its decision upon an inapplicable citation, to wit, *United States* v. *Norstrand Corp.*, 168 F. 2d 481, thereby ignoring and disregarding the distinction in the standards enunciated and prescribed by this Court between motions for withdrawal of a plea of guilty *after* sentence, from those made *prior* to sentence.

In this case, the motion to withdraw the plea was made *prior* to sentence, and is subject to the standard enunciated by this Court in the following cases:

In *Gearhart* v. *United States*, 272 F. 2d 499, the court stated:

> "When, however, as here, the motion to withdraw the plea is made *before* sentence is imposed, this court has interpreted the first clause of Rule 32(d) to set a more lenient standard."

In *Poole* v. *United States*, 250 F. 2d 393, 400, the court stated:

> "The trial court erred when it denied appellant's request to withdraw his plea of guilty. Leave to withdraw a plea *prior* to sentencing should be freely allowed. As we said in *McJordan* v. *Huff*, 1943, 77 App. D.C. 171, 172; 133 Fed. 2d 408, 409 • • • It

> goes without saying that a plea of guilty at that time (arraignment) can be and often is changed on proper motion, as a matter of course."

In *Bergen* v. *United States*, 145 F. 2d 181, 186, the court stated:

> "While the burden is on the accused to show cause for the changing of his plea, the court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, * * * and his motion seasonably made. And in any case, a motion should not be denied where it is evident that the ends of justice would best be served by granting it."

In *Kercheval* v. *United States*, 1927, 274 U.S. 220, at page 224, 47 S. Ct. 582, at page 583, 71 L. Ed. 1009, the court stated:

> "The Court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any* reason the granting of the privilege seems fair and just."

Whereas in the *Norstrand* case, *supra*, relied upon by the Circuit Court of Appeals, the motion to withdraw the plea was made *after* sentence, and the court there held that the defendant therein had failed to meet the standard of "manifest injustice" which is required to be proven in such motions *after* sentence.

The Circuit Court of Appeals erred in disregarding such distinction by applying the strict standard of "manifest injustice" enunciated in *Norstrand*, *supra*, and which is applicable solely to motions for the withdrawal of a plea

of guilty made *after* sentence, to the motion in the case at bar, which was made *prior* to sentence. The Circuit Court of Appeals below is without authority to obliterate such established distinctions and rewrite the prescribed standard for a motion to withdraw a plea of guilty made *prior* to sentence. Hence, the decision of the Circuit Court of Appeals, based as it was upon such inapplicable citation and inapplicable standard, was not determinative of petitioner's motion.

2. The Circuit Court of Appeals below erred in sanctioning the District Judge's mistreatment of petitioner's motion for withdrawal of the plea of guilty, as a request for clemency. Throughout the record the District Judge repeatedly referred to "clemency", although no request therefor was or could have been made. He remarked that he had no right to exercise clemency and that the only person who could exercise clemency was the President of the United States.

> "14(a) Counsel, my position is that the only person who can exercise clemency is the President of the United States * * * Congress has taken away from me the right to exercise clemency. I think I am right on the law, but if I am wrong, you should appeal."

Petitioner was entitled to have his motion for withdrawal of his plea of guilty treated as such. However, the District Judge failed to do so and refused to grant the motion because he apparently considered it as one for clemency which he was not authorized to grant. In so doing, the District Judge ignored the impact of this Court's decision in *Poole* v. *United States*, *supra*, wherein the

court mistreated the motion to withdraw a plea of guilty as one for reduction of sentence, stating:

> "Such a motion is essentially a plea for leniency and presupposes a valid conviction * * * It is wholly inadequate to test the propriety of allowing a guilty plea to stand."

Hence, the denial of petitioner's motion, based as it was upon a misconception as to the nature thereof, was not determinative of petitioner's motion.

3. The Circuit Court of Appeals erred in sanctioning the wrongful assumption of the District Judge that the withdrawal of the plea of guilty is not a matter of discretion thereby ignoring the established doctrine of *Bergen* v. *United States, supra*:

> "The granting or denial of a motion to withdraw a plea of guilty is within the discretion of the trial court * * *. An abuse of the Court's discretion in refusing to allow a withdrawal of a plea of guilty is reversible error * * *"

Throughout the record the District Judge constantly remarked that he had no discretion to grant the motion:

> "15(a) I don't think that the way you presented it presents a question of discretion, but it might be."
> "17(a) I have no power to withdraw or permit the withdrawal of the plea on the grounds advanced, whether the Government consents or does not consent—and I take it the Government consents."
> "17(a) I have no power to withdraw or permit the withdrawal of a plea on the grounds advanced. * * *"
> "17(a) You know, we have a lot of judges on the seventeenth floor who can decide it * * *"
> "17(a) And still I feel powerless to permit him to withdraw his plea."

It appears that the District Judge, having erroneously considered the petitioner's motion as one for clemency, therefore assumed that he had no discretion to grant the motion. The erroneous assumption of the District Judge that he had no discretion to permit the withdrawal of the plea of guilty becomes more apparent when the foregoing remarks are read in connection with his repeated references to "clemency". Hence, the decision of the District Judge, based as it was upon the erroneous assumption that the withdrawal of the plea was not a matter of discretion, is not determinative of petitioner's motion.

4. The Circuit Court of Appeals erred in sanctioning the arbitrary action of the District Judge in preventing petitioner from specifying the grounds of his motion by reason of the summary nature of the denial thereof, notwithstanding *Poole* v. *United States*, *supra*, which states:

> "Facts which come to light after entry of the plea may be used to show that the plea was invalid when entered."

In essence, the hearing of the motion consisted of the following colloquy:

> "12(a) Mr. Saunders: * * * At this time, if the Court pleases, on behalf of the defendant Nagelberg I move the plea of guilty heretofore interposed be withdrawn at this time * * * But there are *certain factors and facts that have arisen since the time of the plea*, and I think in the interests of justice, if the Court pleases, that this plea should be withdrawn at this time. * * * (Italics supplied).
> "The Court: Does the Government want to be heard?"

"13(a) Mr. Tendy: The Government will not object to defendant's application, sir.
"The Court: Motion denied."

Thereupon the District Judge refused to permit either defense counsel or the Assistant United States Attorney to approach the bench concerning such motion, although permission to do so was requested.

"13(a) Mr. Saunders: May we approach the bench?
"The Court: No * * *
"Mr. Tendy: I would request permission to approach the bench, your Honor.
"The Court: No * * *."

The District Judge should have afforded petitioner the opportunity to specify the grounds of his motion, to wit, the factors and facts which had arisen since the guilty plea. Hence, the decision of the District Judge in failing to do so, was arbitrary and in derogation of petitioner's right to set forth the grounds of his motion.

5. The Circuit Court of Appeals erred in basing its decision upon a contention not urged, and in fact, disclaimed by petitioner, to wit, post-plea cooperation. It was arbitrary for the Circuit Court of Appeals below to assume that there were no grounds in support of the motion, other than the post-plea cooperation of the petitioner. The post-plea cooperation of petitioner was not mentioned until after the denial of the motion for withdrawal of petitioner's plea of guilty, in an attempt to convince the District Judge to permit petitioner an opportunity to specify the grounds of the motion (13a). Thereafter, petitioner requested a reconsideration of the denial of the motion, not only upon the original grounds, but also upon the additional ground of

such post-plea cooperation (14a). The fatal prejudice to petitioner of being prevented from setting forth the grounds of his motion, was compounded by the wrongful assumption of the court that the only ground in support of the motion, was the post-plea cooperation of petitioner. Hence its decision is not determinative of petitioner's motion.

6. The Circuit Court of Appeals erred in failing to construe petitioner's plea of not guilty as an assertion of innocence. Moreover petitioner was prevented from reasserting his innocence by the summary denial of his motion. Hence its decision is not determinative of petitioner's motion.

CONCLUSION

For all of the reasons hereinabove set forth, it is respectfully submitted that this petition be granted and that a writ of certiorari issue.

Respectfully submitted,

IRWIN KLEIN
Attorney for Petitioner
Two Park Avenue
New York 16, N. Y.

APPENDIX A

Opinion of the Circuit Court of Appeals

PER CURIAM:

On July 18, 1962, appellant withdrew an earlier plea of not guilty, and voluntarily entered a plea of guilty to all three counts of an indictment alleging narcotics violations. Four months thereafter, following several adjournments of sentencing, he moved to withdraw the guilty plea on the grounds that he had subsequently cooperated with and been of assistance to governmental authorities. Finding that such cooperation would not, by itself, justify withdrawal of the plea, Judge Murphy denied the motion. Before appellant was finally sentenced to the statutory minimum of five years on each count (the sentences to run concurrently), and eight months after the entry of the plea of guilty, the motion was renewed on the same grounds, and was once again denied.

Appellant's willingness to be of assistance to the government is not a sufficient basis for permitting his plea of guilty to be withdrawn. Furthermore, appellant has never denied his guilt nor asserted that his plea was improperly induced or extracted, *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (2nd Cir. 1948), although an unusually long period of time elapsed between July 18, 1962, when the guilty plea was entered, and March 18, 1963, the sentencing day.

We find no merit in appellant's other contentions. The judgment of conviction is affirmed.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN BATSON,
Defendant,

GERSON NAGELBERG,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Decision on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GERSON NAGELBERG,

Defendant-Appellant.

Before CLARK, MOORE, and KAUFMAN, Circuit Judges.

On Petition for Rehearing

Irwin Klein, New York City,
for defendant-appellant.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
L. P. M.
I. R. K.
U. S. C. JJ.

Nov 27 1963

Decision on Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GERSON NAGELBERG,

Defendant-Appellant.

PETITION FOR REHEARING IN BANC

Irwin Klein, New York, N. Y.,
for defendant-appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

Nov 27 1963

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 785

GERSON NAGELBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11) is reported at 323 F. 2d 936.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1963 (Pet. App. 12). A petition for rehearing was denied on November 27, 1963 (Pet. App. 13, 14). An order by Mr. Justice Harlan dated December 13, 1963 extended the time for filing a petition for a writ of certiorari to and including January 25, 1964. The petition was filed on January 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

726-001—64

QUESTION PRESENTED

Whether the trial court, prior to sentencing, properly refused to allow petitioner to withdraw his plea of guilty, notwithstanding the government's acquiescence, where the motion was predicated solely on petitioner's subsequent cooperation with the government in its efforts to uncover other violations of law.

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner was charged in a three-count indictment returned in the United States District Court for the Southern District of New York, the first two counts charging unlawful sales of narcotics and the third conspiracy to violate the narcotics laws (R. 6–8). On April 11, 1962, petitioner pleaded not guilty to all three counts (R. 2, 9). On July 18, 1962, petitioner, with counsel present, moved to withdraw his plea of not guilty and pleaded guilty to the three counts (R. 3, 10–11). This colloquy took place (R. 10):

> The COURT. * * * Are you pleading guilty to counts 1, 2 and 3?
>
> Mr. SANDERS [petitioner's counsel]. Yes, Your Honor.
>
> The COURT. Is that your understanding, Mr. Nagelberg?
>
> The DEFENDANT. Yes.
>
> The COURT. In other words, you want to plead guilty to two crimes of possessing and selling heroin, one on the 15th of June 1960 and the other on the 17th of August, 1960 and the third count of conspiring with John Batson to violate the Federal Narcotic laws, is that true?
>
> The DEFENDANT. Yes.

The court asked if the petitioner knew that the court was required by Congress to impose a minimum sentence of five years on each of those crimes, and the petitioner answered in the affirmative. When assured by petitioner that no promises had been made to him by his attorney, the government attorney, or by anyone else, the court accepted the plea (R. 11).

In November 1962, when petitioner's case came before the court for sentencing, petitioner's counsel moved to withdraw the guilty plea, saying (R. 12):

> I understand, if the Court pleases, that there was a thorough interrogation of the defendant at the time that he took this plea, but there are certain factors and facts that have arisen since the time of the plea, and I think in the interests of justice, if the Court pleases, that this plea should be withdrawn at this time.

Government counsel stated he did not object to petitioner's application (R. 13). Counsel referred to petitioner's cooperation with the government and the court indicated that the probation report reflected the fact (R. 13). When counsel said the probation report did not reveal the full extent of cooperation, the court said (R. 14):

> I would assume the man has helped you more than anybody in history. I still say that that is not a ground for giving him permission to withdraw his plea.

The court noted that Congress had taken away its power to exercise clemency (R. 14). It denied the motion on the ground that cooperation was not a ground for granting a motion to withdraw the plea (R. 14–15).

Sentencing was adjourned and the matter came before the court again on March 18, 1963. Petitioner's counsel renewed his motion to withdraw petitioner's plea of guilty on the basis of petitioner's cooperation with the government and the government attorney consented to the motion (R. 17). In denying the motion the district court stated: "I have no power to withdraw or permit the withdrawal of a plea on the grounds advanced, whether the government consents or does not consent" (R. 17).

The court sentenced petitioner to the minimum term of five years (R. 19, 21–22).

DISCUSSION

The only ground assigned for withdrawal of the plea was petitioner's cooperation with the govern-

ment after he entered his plea of guilty. The record does not support petitioner's contention that he was prevented from presenting to the district court other grounds for withdrawal of his plea. Although the court, after stating that the motion was denied, refused permission for counsel to approach the bench and insisted on argument in open court (R. 13), petitioner's counsel was in no way limited in his presentation of reasons supporting his motion. The only ground advanced was petitioner's cooperation (R. 14–15, 17). Petitioner did not deny that his plea had been knowingly entered and had not been induced by promises; he did not deny commission of the offenses or claim any defense to the charges. Nor was any other reason given why a guilty plea should not have been entered. Cf. *United States* v. *Fox*, 130 F. 2d 56, 59 (C.A. 3), certiorari denied, 317 U.S. 666; *United States* v. *Moore*, 290 F. 2d 501 (C.A. 2), certiorari denied, 368 U.S. 837. Petitioner's motion, standing alone, thus presented no basis on which the court could exercise its discretion to permit withdrawal of the plea.[1] It could only serve as an appeal

[1] Petitioner argues that since his motion for withdrawal of the guilty plea was made prior to, instead of after, sentence as in *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (C.A. 2), the court of appeals improperly relied upon that case to impose upon petitioner a stricter standard of showing "manifest injustice" under the second clause of Rule 32(d) instead of under the more lenient standard in the first clause of the rule (Pet. 4–6). The court below, however, cited *Norstrand* only in the context of petitioner's failure to deny his guilt or to assert that his plea was improperly induced or extracted (Pet. App. 11)—factors which are relevant whether the withdrawal motion is made before or after sentence.

for leniency, to which the court responded by imposing the minimum penalty on each of the three charges and by providing that the sentences should run concurrently.

The question arises, however, whether the government's acquiescence in petitioner's motion to withdraw his plea changes the situation. While the point is not urged in this Court, petitioner argued in the court of appeals that the government's consent to the granting of the motion bound the court, and we think it proper to notice the contention.

We are clear that a court remains free to refuse permission to withdraw a plea of guilty despite the government's acquiescence. Thus, in the present circumstances, it may well be that denial of the motion would not have been an abuse of discretion. On the other hand, it seems to us that an explicit request by the government to vacate the plea so as to permit an exercise of prosecutorial discretion empowers the judge to act and requires him to exercise his judicial discretion. Cf. *Petite* v. *United States,* 361 U.S. 529; *Marakar* v. *United States,* 370 U.S. 723. The difficulty here is that the trial judge apparently thought himself wholly without power to act on the government's acquiescence (R. 12–18; Pet. 7–8). That was perhaps because of the equivocal procedural posture of the matter and because the prosecutor did not explain (on the record, at least) what course he intended to pursue if the motion were granted. Indeed, the government's bare consent to a defense request to withdraw a plea of guilty was wholly irrelevant unless it was the equivalent of a government motion to va-

cate an adjudication of guilt preliminary to a dismissal of the charges. While it seems to us that was the implication of the government's acquiescence, it is true the purpose was not expressly stated. Thus, it may be that the court was misled. But, in any event, it is important that the trial court be afforded an opportunity to exercise its discretion, as on a government motion to dismiss the indictment, with a full appreciation of the government's motives and intentions.

The fact is that, in recognition of his valuable cooperation in uncovering other offenders, the government planned to dismiss the pending indictment against petitioner and substitute lesser charges.[2] It was with a view to that end that the government consented to a withdrawal of the plea of guilty already entered. That was, on its face, a proper implementation of the governmental policy—both necessary and just—of treating with leniency those who have broken the law but now materially contribute to law enforcement, sometimes imperilling their own lives to make possible the apprehension of more dangerous criminals. To be sure, prosecutorial discretion in such cases is usually exercised before indictment, or at least before arraignment. Yet, the accident that valuable cooperation occurs only after a plea of guilty has already been entered does not

[2] The intention was to substitute for the present indictment charging violations of 21 U.S.C. 174 (which carries a minimum sentence of five years, without possibility of probation or parole) an indictment under 26 U.S.C. 4704(a) which carries a minimum of two years and permits of probation or parole. See 26 U.S.C. 7237(d).

change the policy considerations supporting some freedom of governmental action. Doubtless, when the matter has proceeded so far, the exercise of prosecutorial discretion is properly subject to judicial scrutiny. But the court should not peremptorily reject the government's considered decision. Nor, of course, is there any reason to delay action until a final judgment of conviction has been entered or sustained on appeal.'

We do not deem it appropriate to argue here whether, in the present circumstances, the trial judge should defer to the government's acquiescence. That would require going far beyond the record. Moreover, it is, in the first instance, a question for the district court. Our submission is that the cause should be remanded to the district court so as to permit the trial judge to make an informed judgment after the government has made a full disclosure of its intentions and of its reasons. Accordingly, the United States does not oppose the granting of the petition for certiorari and the entry of an order vacating the judgment of the court of appeals and remanding the case to the district court to enable it to consider in appropriate proceedings whether it should not vacate its own judgment, permit the with-

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'Of course, the government might have awaited sentencing and presented its own motion to vacate the judgment in the trial court, or later, even in this Court. Cf. *Petite* v. *United States*, *supra*. But it seemed preferable to join in the defendant's motion to withdraw his plea, rather than consent to the entry of judgment which it would then ask to have set aside.

drawal of the plea of guilty and grant leave to dismiss the indictment.

Respectfully submitted.

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APRIL 1964.

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